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No. 81-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD B. RICE TIRE COMPANY, INC.,
Petitioner,

v.

MICHELIN TIRE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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September 11, 1981

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Petitioner Donald B. Rice Tire Company, Inc. ("Rice") respectfully submits this reply to the brief of respondent Michelin Tire Corporation ("Michelin").

As a general matter, Rice must note that Michelin's brief virtually ignores the first issue before this Court: whether this Court need define the appropriate antitrust standard by which to judge restraints of trade in a dual distribution context. Nor does Michelin's recitation of selective findings of the District Court advance resolution of the second question presented: whether legal propositions announced by the Court of Appeals for the Fourth Circuit conflict with the holdings of this Court or of other Circuit Courts of Appeal. Importantly, Michelin's brief does not dispute the importance of resolving that conflict, but apparently seeks to embroil this Court in a *de novo* review of facts.[1]

[1] Despite its unimportance to the issues raised in the petition, at least one of Michelin's mischaracterizations of the facts found below warrants a response. Neither the District Court nor the

Michelin's brief notwithstanding, this petition does not turn upon factual conflicts. Unlike Michelin, which mounts a lengthy attack upon the District Court's findings (Brief for Respondent at 5, 6-7 and 22-25), Rice accepts the facts found below.[2] Rice questions only the propriety of the legal standard applied by the Court of Appeals for the Fourth Circuit. The primary question presented is not the ultimate reasonableness or unreasonableness of the termination of Rice as a Michelin dealer, but what analytical framework a court should employ to assess the antitrust legality of such a termination. The issue framed for this Court is whether the Court below erred by holding that restraints imposed by a manufacturer upon a competing distributor in a dual distribution system should be characterized mechanically as "vertical" restraints and analyzed solely under the Rule of Reason.

This Court has acknowledged the difficulty of differentiating horizontal from vertical restraints of trade. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 n.28 (1977). Michelin abruptly dismisses, as no more than semantics, the distinct analyses employed by

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Court below found that Rice made a "flagrant" decision to disregard "deliberately" or to "flatly refuse to perform" its contractual obligations under the Michelin Dealer Sales Agreement ("DSA"). (Brief for Respondent at 3, 4 and 7). A careful examination of the opinions below reveals that neither the District Court nor the Court of Appeals found that Rice breached its contract with Michelin.

Rice reserves other responses to Michelin's mischaracterization of the facts for its brief on the merits should this court grant the petition.

[2] While Michelin takes issue with certain factual findings, it conspicuously avoids discussion of the most significant finding. Michelin's primary reason for terminating Rice was to seize the wholesaling business that Rice, with Michelin's knowledge and encouragement, built for itself over the years. (Petition, App. D at 9a-10a).

this Court and other courts in making the horizontal/vertical distinction. (Brief for Respondent at 18). However, courts and legal commentators agree that "differing choices of words" can lead to different results. *See, e.g.*, Altschuler, *Sylvania, Vertical Restraints and Dual Distribution*, 25 ANTITRUST BULL. 1 (Apr. 1980), and other authorities cited in Petition at 6 n.3. In the present case, the Courts below employed the wrong "choice of words" and, Rice submits, reached the wrong result.

In sum, Michelin's brief does not seriously address the confusion and conflict in an important area of antitrust law—restraints in a dual distribution context. Only this Court can clarify the law by returning the lower courts to the earlier analysis of restraints adopted by this Court in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 313 (1956), and reaffirmed in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972).

Respectfully submitted,

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